Ray Angelini, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 98. Case 4–CA–24904

July 5, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On September 26, 2000, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Ray Angelini, Inc., Sewell,New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Richard Wainstein, Esq., for the General Counsel.
Marc Furman and *Thomas C. Zipfel, Esqs*., of Elkins Park, Pennsylvania, for the Respondent.
Richard C. McNeill Jr., Esq., of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. This case was heard before me on February 22, 2000, in Philadelphia, Pennsylvania, pursuant to a charge against Respondent Ray Angelini, Inc. (RAI) filed by International Brotherhood of Electrical Workers, Local Union No. 98 (the Union or Local 98) on May 7, 1996, and a complaint issued on February 20, 1998, and amended on February 8, 2000. The complaint in its final form alleges that RAI violated Section 8(a)(1) of the National Labor Relations Act (the Act) by filing, maintaining, and prosecuting before the United States district court an unmeritorious lawsuit against Local 98 in retaliation for Local 98's exercise of rights guaranteed in Section 7 of the Act. See *Ray Angelini, Inc. v. City of Philadelphia,* 984 F.Supp. 873 (E.D.Pa. 1997).

On the basis of the entire record, including the demeanor of the one witness who testified before me, and after due consideration of the briefs filed by counsel for the General Counsel (the General Counsel) and RAI, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LOCAL 98'S STATUS

RAI is a New Jersey corporation with a facility in Sewell, New Jersey. At all material times, RAI has been engaged as an electrical and general contractor in the construction industry. During the year preceding the issuance of the complaint, RAI, in conducting its New Jersey business operations, performed services valued in excess of $50,000 outside New Jersey. I find that, as RAI admits, it is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act.

The Union is a labor organization within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Effect of the District Court's Findings of Fact

RAI counsel stated at the hearing before me that RAI was bound by the district court's findings of fact to the extent that they were necessary to the determination which was actually made by the district court. The record before me includes, as an exhibit, General Counsel's Exhibit 4, Respondent's proposed findings of fact and conclusions of law filed with the district court in that lawsuit, which was eventually dismissed with prejudice. Some of these proposed findings of fact were not included in the district court's opinion, and (as to some extent discussed infra) some of them were rejected in terms and/or are inconsistent with the district court's findings. The parties stipulated that General Counsel's Exhibit 4 is what it purports to be and that it was filed in the district court. The document was received into evidence without objection, but union counsel stated, "[W]e stipulate that [this is the document that was] presented and . . . filed, but not the veracity or information contained inside." After receiving RAI's posthearing brief to me, I wrote a letter to RAI's counsel asking why they repeatedly cited this exhibit in seeming effort to support certain factual allegations in their brief. Counsel's reply letter states, in part:

> With regard to your request for clarification of why [RAI] made reference to General Counsel Exhibit 4 in its brief, [RAI] made reference to the document to demonstrate Angelini's basis for bringing the lawsuit at the district court level.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In agreeing with the judge's conclusion that the Respondent violated Sec. 8(a)(1) of the Act by filing and maintaining its unmeritorious lawsuit against Local 98 in retaliation for the exercise of Sec. 7 rights, we do not adopt the judge's reliance on the language of the Respondent's filings to the district court. See sec. II,D, "Analysis and Conclusions," par. 3, last sentence and fn. 17 of her decision.

We further note that the following decisions, relied on by the judge, have subsequently been enforced: *Petrochem Insulation, Inc.*, 330 NLRB 47 (1999), enfd. 240 F.3d 26 (D.C. Cir. 2001); *BE & K Construction Co.*, 329 NLRB 717 (1999), enfd. 246 F.3d 619 (6th Cir. 2001).

> While some of the references were made by way of background—all of which was uncontested by counsel for the General Counsel, most of the references were made to support [RAI's] claim that an unlawful conspiracy occurred between the City of Philadelphia and the Union. The factual averments pulled out of G.C. Exh. 4 set forth the conspiracy, and evidence supporting the basis of a conspiracy, from [RAI's] view. It further demonstrates that two years before the current claim arose, [RAI] was claiming that the basis for the district court lawsuit was an unlawful conspiracy and that [RAI] was providing evidence to demonstrate that theory.[1] The General Counsel and the Union are alleging that the basis for the district court action was retaliatory in nature. The evidence pulled out of G.C. Exh. 4, demonstrates that from the very beginning the lawsuit was based on the Union's unlawful activity that is not protected by Section 7 of the Act. Finally, as explained by counsel at the hearing, [RAI] is not attempting to relitigate the underlying case. Instead, [RAI] makes reference to the exhibit in order to demonstrate the motive for filing the underlying lawsuit, that motive is a critical part of the analysis under [*Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983)].
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> G.C. Exh. 4 was, by its very identification, placed into evidence by counsel for the General Counsel. There was no issue taken with the contents of the said exhibit and there is no testimony in the record that would dispute the positions taken by [RAI] therein.

In making my findings of fact, I have considered General Counsel's Exhibit 4 as evidence of what RAI was contending in the district court lawsuit, and of the reasons advanced to the district court by RAI for initiating, maintaining, and prosecuting that lawsuit. I do not regard General Counsel's Exhibit 4 as probative of any of the factual assertions made therein. Furthermore, I do not regard the inclusion of any factual assertion in General Counsel's Exhibit 4, standing alone, as showing either that the district court record includes evidence which is not in the record before me and would tend to show the truth of that assertion, or that when that assertion was made, RAI honestly believed it to be true.

Respondent's posthearing brief also relies on General Counsel's Exhibit 2, which is RAI's complaint in the district court lawsuit with an attachment consisting of an affidavit by Attorney Roy S. Cohen, who from time to time has acted as RAI's counsel, and who testified for RAI in the district court lawsuit but did not act as RAI's attorney in that lawsuit.[2] This exhibit was offered and received into evidence with the stipulation that it is what it purports to be, but with the understanding that the stipulation did not extend to the veracity or information contained therein except to the extent that such averments would constitute admissions by RAI. Upon my inquiry (by letter dated May 9, 2000) as to why RAI's brief referred to General Counsel's Exhibit 2, a letter to me from RAI counsel dated May 19, 2000, states in part as follows:

> [T]he references are used when describing the conversation [RAI's] Counsel Roy Cohen had with Philadelphia Commissioner Louis Applebaum. The details of that conversation were set forth in Mr. Cohen's affidavit which was attached to the federal Complaint as an exhibit. The federal Complaint was put into the record as General Counsel's Exhibit 2. The reason for relying on the information contained in the federal Complaint and the affidavit is that both documents set forth the factual basis upon which the federal lawsuit was based. It is respectfully submitted that Your Honor must look to the motivating factors behind the filing of the federal lawsuit. These documents set forth the basis for that motivation – an unlawful conspiracy between Local 98 and the City of Philadelphia which was revealed to Roy Cohen. [RAI president] Ray Angelini testified without contradiction that he relied on the facts set forth in the affidavit to file the lawsuit.[3]

In making my findings of fact, I have considered Attorney Cohen's affidavit in light of Angelini's testimony as to his motive for initiating and maintaining the district court lawsuit. I have also considered the remaining portions of General Counsel's Exhibit 2 as evidence of what RAI was contending in the district court and of RAI's motive in initiating and maintaining that lawsuit. However, except to the extent that the averments in the latter-described portions of General Counsel's Exhibit 2 were admitted in Local 98's answer in the district court lawsuit, I do not regard such averments as probative of the truth of the factual assertions therein.

RAI's frequent use of its proposed findings of fact, and of the averments in its complaint, before the district court as the sole cited basis for factual assertions in its brief to me has caused me a good deal of difficulty in ascertaining which such factual allegations are supported by probative evidence in the record before me.[4]

B. Background

RAI operates as a general contractor and an electrical contractor in Pennsylvania, New Jersey, and Delaware (984 F.Supp. at 874–875).[5] For about 25 years, RAI has performed

[1] The charge in the case at bar was filed about 15 months before RAI filed GC Exh. 4 with the district court, and about 2 weeks after RAI had initiated the district court lawsuit and begun to put in evidence in attempted support of its request to the district court for a preliminary injunction.

[2] At certain points in RAI's brief to me, GC Exh. 2 is referred to as GC Exh. 1. Also, the citations in Respondent's brief, to certain paragraph numbers in GC Exh. 2, refer to Attorney Roy Cohen's attached affidavit. By letter to me dated May 19, 2000, Attorney Thomas C. Zipfel corrected these errors.

[3] Cf. *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 407–408 (1962).

[4] Moreover, citing its district court proposed findings of fact, RAI asserts (br. p. 7) that RAI was found disqualified for the Philadelphia Airport job involved in the instant case "As a result of unlawful political pressure and a conspiracy between Local 98 and the City" of Philadelphia. The district court found that RAI had failed to prove that the decision to disqualify RAI on that job "was the result of improper political influence or agreement between the City and Local 98." 984 F.Supp. at 882, par. 6. See also RAI's brief to me p. 13 ("the facts above demonstrate an unlawful conspiracy"); p. 16 (RAI was disqualified "as a result of a conspiracy between the federal [sic] defendants to deny [RAI's bid] based upon its open shop status").

[5] Citations to the district court's opinion do not necessarily mean that all of my findings in that sentence were also made by the district court.

work, mostly as an electrical contractor, in Philadelphia, Pennsylvania (the city), on projects ranging in value from $200,000 to $800,000 (984 F.Supp. at 875). Much of RAI's work is on public sector projects where State prevailing wage statutes apply. (984 F.Supp. at 874). RAI usually operates on an open-shop basis, and has not been under contract with Local 98 for about 20 years. Pursuant to a petition filed by IBEW Local 439 and docketed as Case 4–RC–16775, the Board conducted an election on June 21, 1988, in a voting group which consisted of all of RAI's full-time and regular part-time electricians, electrician mechanics, apprentice electricians, trainee electricians, and helpers; but excluding (inter alia) carpenters and carpenter helpers. The tally of ballots showed that of about 31 eligible voters, 10 voted for Local 439, 20 voted against Local 439, and 1 ballot was challenged. On September 7, 1988, the Acting Regional Director issued a supplemental decision overruling Local 439's objections to the election and certifying the election results.[6] In seeking construction contracts, RAI has bid against both union and nonunion contractors. RAI President Raymond G. Angelini's father has been a union president and a secretary-treasurer or a business agent of the Metal Trades Council; President Angelini's brother-in-law has also been a union official.

In order to bid on a project for the City, a contractor must be "prequalified" to bid that particular project. In order to obtain prequalification status, a contractor must submit evidence of financial status and of experience relevant to performance of the job. RAI has been considered a prequalified bidder in the City on dozens of occasions.

In late 1995, the City solicited bids for electrical work for a project at the Philadelphia International Airport (the Philadelphia Airport job or the Bid 6551) (984 F.Supp. at 875). After having obtained prequalification status, RAI submitted a bid of $6,778,000 (984 F.Supp. at 875). This was the lowest bid for the job; the next lowest bidder was a union contractor, Lombardo & Lipe, which submitted a bid of $7,372,000 (984 F.Supp. at 875). About December 20, 1995, RAI was given notice that it was the low bidder.

Thereafter, Angelini heard "rumors" from "tradespeople who were visiting" RAI, from "salesmen who were visiting" RAI, and "from a prospective management employee that [Angelini] was interviewing" that there was a possibility that Local 98 and Lombardo & Lipe were trying to have RAI disqualified. In early January 1996, John Dougherty, who at all material times has been Local 98's business agent (an elective office), advised Gerald Murphy, who at all material times has been the City's deputy mayor for labor, that in the performance of certain jobs for the State of New Jersey RAI had been found to have violated New Jersey's regulations requiring payment of prevailing wages (984 F.Supp. at 876, par. 19). Following inquiries by Murphy, the New Jersey Department of Labor advised him, by letter dated January 25, 1996, that RAI had violated such New Jersey regulations on three occasions during the past 5 years (984 F.Supp. at 876, par. 26). On February 6, 1996, the City's procurement department advised RAI that it was being disqualified from receiving an award of a contract on the Philadelphia Airport job "based upon information, including wage and hour violations, which the Procurement Department received subsequent to the opening of bids." (984 F.Supp. at 877, par. 40.) This was the first occasion on which RAI had been found disqualified from bidding on a city project.

At this point, RAI requested a disqualification hearing. At that hearing, which was held on February 13, 1996, and was attended (as spectators, so far as the record shows) by Dougherty and several other Local 98 members and/or officials, RAI was advised that three specified violations of New Jersey prevailing-wage regulations had been the basis for RAI's disqualification (984 F.Supp. at 878–879, par. 47). One of these violations, for which RAI had paid about $800 in backpay and penalties, was caused by an RAI payroll clerk's 1991 clerical error in failing to make a timely notation of an employee's change in status. The second of these, for which RAI had paid about $315 in backpay and penalties, was caused by a payroll clerk's 1994 error in calling for 1 hour's Saturday overtime pay at time and a half instead of double time. The third of these, for which RAI paid about $19,000 in back wages, was caused by an RAI construction employee's 1993 failure to advise RAI, until after he had resigned from RAI's employ, that he had dropped out of a school which he had been required to attend as an apprentice and, therefore, under New Jersey regulations was entitled to receive higher pay than if he had continued to attend school. During the disqualification hearing, there was also a good deal of discussion regarding RAI's activities on the current Belmont Pumping Station project in Philadelphia, on which no violations had previously been alleged; however, the hearing panel discarded this evidence (984 F.Supp. at 879, pars. 72–73). On the day after the disqualification hearing, Angelini was notified that the hearing panel (which consisted of City Director of Procurement Applebaum and two other city officials) had upheld the disqualification. Angelini credibly testified that by that time he believed that one of the reasons RAI had failed to obtain the Philadelphia Airport job was that Local 98 had provided information to the city to have RAI kicked off the project.

On February 16, 1996, 2 days after Angelini learned that RAI's disqualification had been upheld on appeal, RAI filed against the city and Lombardo & Lipe a lawsuit in State court (984 F.Supp. at 875). A temporary restraining order requested by RAI, which order (inferentially) prohibited the city and Lombardo & Lipe from entering into a contract for the electrical portion of the airport job, was issued by the State court judge on February 22, 1996. On March 1, 1996, the State court judge determined that he would deny RAI's request for a preliminary injunction, which (inferentially) would have included the same prohibitions as the temporary restraining order, on the ground that RAI could get a remedy through the court system for any monies RAI was due (984 F.Supp. at 875). The complaint in the case before me does not allege that RAI violated the Act by filing or prosecuting this State court action, in which

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On occasion, some of my findings in such a sentence are also based on probative evidence in the record made before me.

[6] My findings as to Case 4–RC–46775 are based on correspondence from the General Counsel and counsel for RAI. Counsel for RAI therein describes the votes against Local 439 as "votes for the Employer."

Local 98 was not a defendant. About March 4, 1996, the city awarded the electrical portion of the Philadelphia Airport job to Lombardo & Lipe.

Before this award was made, Deputy Mayor Murphy was asked to check into whether Lombardo & Lipe had any prevailing wage violations. Murphy's investigation revealed that Lombardo & Lipe had a single prevailing-wage violation dating to 1989, 7 years earlier. He did not investigate further into Lombardo & Lipe, since no other information about this firm was brought to his attention (984 F.Supp. at 879, pars. 87 and 88). After learning that the disqualification determination had been upheld, RAI hired an investigator to determine whether other airport contracts had been awarded to contractors who had prevailing wage violations. On the basis of these investigators' reports to RAI, RAI reported to the city that at least some of these other bidders had engaged in violations much more serious than the violations which had formed the at least ostensible basis for RAI's disqualification. So far as the record shows, no action was taken with respect to these other contractors.

In April 1996, RAI discontinued its State court action (984 F.Supp. at 875). On April 23, 1996, RAI filed in the United States district court for Eastern Pennsylvania the lawsuit whose initiation, maintenance, and prosecution against Local 98 the complaint before me alleges to be an unfair labor practice.

On April 9, 1996, RAI submitted prequalification statements for two bids (on Nos. 6582 and 6583) covering airport work other than the work previously referred to here as the Philadelphia Airport job. Following contacts by State officials with deputy mayor Murphy about possible prevailing-wage violations which would disqualify RAI on these bids, the city notified RAI by letter dated April 25, 1996, that RAI was disqualified from submitting bids on Nos. 6582 and 6583. On appeal by RAI, its disqualification was in effect reversed by a panel which included Applebaum but not the other city officials who had sustained RAI's February 1996 disqualification on the Philadelphia Airport job. RAI did not submit bids on Nos. 6582 and 6583. However, after RAI's disqualification for the Philadelphia Airport job and at least until after the April 8, 1997, end of the trial before the district court, that February 1996 disqualification did not cause RAI to be disqualified from receiving an award of a public or Government contract (984 F.Supp. at 879, pars. 81; 880–881, pars. 99–117).

C. The Proceedings before the United States District Court

1. The parties to the proceeding

RAI's complaint before the district court named as defendants Local 98 and the three-panel members who had upheld RAI's disqualification from the Philadelphia airport job—namely, Applebaum; Frances Egan, then the city's deputy managing director; and James Coleman, the city's deputy managing director. Also named as defendants were the city itself; Edward G. Rendell (the city mayor); David L. Cohen (city chief of staff, not to be confused with RAI Attorney Roy S. Cohen); Gerald Murphy (the city's deputy mayor for labor, whose duties included overseeing a city agency which monitors the payment of prevailing wages on city public work projects, see 984 F.Supp. at 876 par. 15); Marla D. Neeson (the city's deputy procurement commissioner); and Lombardo & Lipe. The complaint alleged that RAI had a cause of action against the defendants "pursuant to 42 U.S.C. § 1983, as a consequence of defendants' deprivation of [RAI's] rights, privileges and immunities secured by the Constitution and laws of the United States."

2. The Roy Cohen affidavit

Attached to RAI's complaint was an affidavit by Attorney Roy S. Cohen (not to be confused with Chief of Staff David L. Cohen, named as a defendant in RAI's lawsuit), who had been RAI's attorney for several years and had represented it throughout the "disqualification issue." Attorney Cohen's affidavit, dated April 17, 1996, stated that on Friday, March 15, 1996, he happened to encounter Applebaum, who is the city's director of procurement and who had been a member of the three-member panel which had sustained the disqualification finding with respect to RAI on the Philadelphia Airport project. The affidavit went on to state, in part:

> 52. Applebaum approached me and said "hello."
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> 53. Applebaum then initiated a conversation about [RAI's] disqualification by asking me whether [RAI] was serious about going forward with a press conference, as had been conveyed to the City, revealing the fact that the City was squandering $600,000.00 by awarding the contract to a union rather than a non-union contractor without justification.
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> 54. I told Applebaum that my client was significantly injured by this decision and that we would have to take whatever steps were necessary.
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> 55. Applebaum argued that it was not true that my client was seriously harmed.
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> 56. I then explained to Applebaum that my client would have to report the finding of non-responsibility almost every time it bid public work for any municipality or agency.
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> 57. Applebaum responded that that could be quickly dealt with.
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> 58. Applebaum warned me that "you can't [expletive deleted] with Eddie or David," referring to Mayor Edward Rendell ("Rendell") and Chief of Staff David Cohen ("Cohen").
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> 59. Applebaum advised that both Rendell and Cohen had been involved in making the decision that the contract be awarded to Lombardo & Lipe rather than [RAI].
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> 60. Applebaum further advised that the decision had been made as a result of Rendell's and Cohen's political obligations to Dougherty, business agent for Local 98 of the International Brotherhood of Electrical Workers Union.
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> 61. Specifically, Applebaum stated that Dougherty had a 5,000 man convention coming to the City and that it would not look good if a non-union contractor was working on the project at the airport.
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> 62. I asked Applebaum whether it bothered him as a taxpayer that the City was willing to pay an additional $600,000 for the work to be performed by Lombardo & Lipe.

63. Applebaum admitted that it was "burning a hole in his stomach" and that he suggested as recently as Thursday, March 14, 1996 that all of the bids be thrown out and that the project be rebid.

64. Applebaum confided that he had been told that there was not sufficient time in order to do this.

65. I then told Applebaum that I was frustrated by the process and that I thought this matter could have been handled more professionally.

66. Applebaum then pointed out that it is rare for officials of the City to get involved in deciding which contractor should be awarded projects.

67. Applebaum then further stated that it was only when Gerald Murphy, Deputy Mayor for Labor, receives a lot of pressure from a particular labor union, that he uses his power to declare a contractor non-responsible to obtain the desired result.

68. Applebaum assured me that this only happened on rare occasions.

69. I observed that that was a sad state of affairs.

At the hearing before me, Angelini testified that Attorney Cohen told him about this conversation with Applebaum. Angelini testified that paragraphs 58–61 of Cohen's affidavit were "consistent with" what he told Angelini about Cohen's conversation with Applebaum. Angelini further testified that as to this Applebaum-Cohen conversation, Attorney Roy Cohen told him that Rendell and Chief of Staff David Cohen were directly involved in making the decision to kick RAI off the project, that the decision to kick RAI off the job was as a result of Rendell's and David Cohen's political obligations to Local 98 Business Representative John Dougherty, and that a 5000-man convention was coming to Philadelphia some time later in the year. Angelini testified that he "absolutely" believed Attorney Cohen's account of his conversation with Applebaum, and that Angelini "absolutely" relied on what Attorney Cohen had said. Angelini went on to testify that on the basis of what attorney Cohen told him, and Cohen's affidavit, Angelini believed that RAI had been "kicked off the job because of a conspiracy between Local 98 and the City; and that of a political obligation." Angelini went on to testify that he believed the wage and hour violations that had been presented to the City of Philadelphia were "just a front." Angelini testified that if he had never heard about this conversation between Applebaum and Attorney Cohen, he would never have joined Local 98 as a party, "Because they did something that was lawful. I mean just bringing up past violations is not against the law. It's something that's done every day."

3. RAI's April 1996 district court complaint and Local 98's June 1996 answer to that complaint

On an undisclosed date after Roy Cohen gave Angelini Cohen's version of his March 15, 1996 conversation with Applebaum and before April 23, 1996, RAI retained a new attorney, Louis T. Sinatra, to represent it in the contemplated lawsuit in Federal court. RAI changed counsel because of the expectation that Roy Cohen would be a witness in that proceeding (as he in fact was). RAI's district court complaint (dated April 23, 1996) alleged in part (emphasis in original):

37. As more particularly noted infra, the City's disqualification of [RAI] occurred at the initiation and instigation of Local 98 and as a consequence of the collaboration between the individual Defendants, the City and Local 98 to attempt to preclude open shop contractors from performing work at the Airport and to divest them of their bid in favor of union contractors such as Lombardo & Lipe.

. . . .

48. Upon information and belief, [RAI] avers that the City entered into an understanding with Local 98 several months ago w the City assured Local 98 that it will attempt to preclude open shop electrical contractors from working at the Airport.

49. This understanding was a *quid pro quo* for the electrical workers bringing a national electrical workers' convention to the City of Philadelphia in the summer of 1996.

50. Specifically, John Dougherty, Business Agent of Local 98, advised the City of his desire to preclude open shop electrical contractors from working at the Airport and specifically on the Project at issue and the City and its officials, individual Defendants herein, agreed to assist Local 98 in that endeavor.

51. Upon information and belief, it is averred that the National Electrical Workers convention will be held in Philadelphia in the summer of 1996.

52. To further its goal of having only union workers at the Airport, the City of Philadelphia has implemented a new "right to work" standard for future Airport projects including the Runway Development project ("Runway Project"), which requires all contractors who work on the Runway Project to execute Project Labor Agreements with the appropriate labor organizations. . . .

53. The Uniform City of Philadelphia Project Labor Agreement ("Agreement") governing the Runway Project was dated January 26, 1996 and references an Executive Order issued by Rendell known as Executive Order No. 5-95 which specifically identifies a goal of having major construction projects in Philadelphia performed consistent with the Project Labor Agreements.

54. [The Philadelphia Airport bid] did *not* have as a requirement the execution of a Project Labor Agreement.

55. As more particularly described hereinafter, individual Defendants all collaborated in ignoring Plaintiff's rights and wrongfully stigmatizing Plaintiff with a "non-responsible bidder" classification as a consequence of improper political and economic considerations.[7]

. . . .

67. At the [disqualification] hearing, [deputy mayor for labor] Murphy acknowledged that the information relating to wage and hour violations which prompted

[7] RAI President Angelini testified that the rights referred to in this paragraph were "The right for anyone, open shop or closed shop . . . to work—do work in the United States—any work, as a responsible bidder."

[RAI's] disqualification from the [Philadelphia Airport] Project was provided to the City by Local 98.

RAI's complaint went on to allege that after Lombardo & Lipe had been awarded the Philadelphia Airport electrical job, RAI had provided the city with "incontrovertible proof" that Lombardo & Lipe, as well as several other union firms which had been awarded other airport jobs, had been "cited with governmental violations more serious and pervasive than the de minimis violation against [RAI] which formed the pretext for the disqualification" of RAI. The complaint alleged that these firms had nonetheless retained their airport contracts, and:

> 117. . . . upon information and belief that Rendell, David Cohen, Applebaum, Murphy and Neeson all were involved in the decision to ignore the obvious disparate treatment by the City when presented with the information about violations by Lombardo & Lipe [and other union firms with Philadelphia Airport contracts] in order to preserve its Agreement with Local 98 to keep the Airport union only.
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> 118. The decision by the City and the individual Defendants to affirm [RAI's] disqualification as contractor on the Project was made as part of the collaboration between Local 98 and the City to foster and promote union activities to the detriment of open shop contractors such as [RAI]; individual Defendants have, therefore, acted for purely political and irrational reasons, unrelated to legitimate governmental objectives, in connection with [RAI's] disqualification from the Project and the wrongful classification of [RAI] as "non-responsible."
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> . . . .
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> 123. . . . the individual Defendants recklessly disregarded the true facts and circumstances relating to [RAI's] disqualification and said Defendants participated in the decision to disqualify [RAI] and classify [RAI] as "non-responsible" for political purposes and economic motives, and in particular to satisfy a "political debt" to Local 98.
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> 124. The actions of the individual Defendants set forth herein . . . were motivated by bias, bad faith and/or irrational objectives, unrelated to legitimate governmental objectives; the individual Defendants were motivated to assist Local 98 as a consequence of said union's commitment to bring the Electrical Contractors' Convention to Philadelphia and by other political factors.
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> . . . .
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> 134. Said individual Defendants, therefore, conspired to violate [RAI's] civil rights in order to foster and promote their relationship with Local 98; the said conspiracy is more particularly described in the Affidavit of Roy Cohen attached to Plaintiff's Motion for Injunctive Relief and the averments in said Affidavit are incorporated by reference.
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> *COUNT III—SECTION 1983 VIOLATION*
>
> *Angelini v. Local 98 of the Electrical Workers' Union*
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> 148. [RAI] incorporates herein by reference, and makes a part hereof, the averments of paragraphs 1 through 147 above.
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> 149. As described above, Local 98 conspired with the other Defendants to violate [RAI's] rights.
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> 150. Local 98 in acting in a conspiracy and in concert with the other Defendants has acted under color of federal law t making it liable under 42 U.S.C. § 1983.
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> 151. Local 98 by participating in the conspiracy described above deprived [RAI] of its rights to substantive due process and liberty as guaranteed by the Fourteenth Amendment of the Constitution of the United States by encouraging disparate treatment of [RAI] because it is an open shop contractor.
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> 152. As a direct result of the wrongful acts and omissions of Local 98 and the other Defendants, [RAI] has sustained damages and will continue to sustain damages in the future including but not limited to lost profits and earnings in connection with the project and consequential damages resulting from the injury to Angelini's reputation as a responsible contractor.
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> 153. [RAI] is further entitled to recover costs, expenses, and attorneys' fees from Local 98 pursuant to 42 U.S.C. § 1988.
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> 154. Local 98 acted with reckless and callous disregard and indifference to the rights and liberty interest of [RAI]; accordingly, Angelini is entitled to punitive damages against Local 98 for its willful, wanton and malicious conduct.
>
> 155. Local 98's willful, wanton and malicious conduct was manifested by Local 98's conduct previously directed against [RAI] and others and the current conspiracy in which Local 98 is a key and active participant.

Earlier portions of RAI's complaint (pars. 38–47), captioned "Prior Union Activity Directed Against [RAI] and Others," had included allegations regarding Local 98's 1995 actions in connection with RAI's award of a "SEPTA" job and the low bid of open-shop contractor Wescott on a fire alarm job at the Airport. As to the SEPTA job, the complaint alleged that Local 98 had "submitted information to SEPTA" regarding RAI's financial responsibility, in an "unsuccessful attempt . . . to have a public entity classify [RAI] as 'non-responsible' and strip away an award from [RAI] where [RAI] was the lowest responsible bidder." As to Wescott, the complaint alleged that Wescott had initially been found "non-responsible" (a determination reversed on appeal) "as a result of information delivered to the City by Local 98."[8] I infer that paragraphs 38–47 described Local 98's alleged conduct to which RAI referred in paragraph 155 of its complaint.

RAI's complaint included the following prayer for relief:

[8] Because the city thereafter restructured the bid on Airport jobs by folding into the entire electrical contracting work the work on which Wescott was the low bidder, Wescott never did perform the work on which it had bid.

> WHEREFORE, [RAI] demands judgment in its favor and against Defendant Local 98 jointly and severally:
>
> 1. In an amount presently undetermined but well in excess of $100,000.00;
> 2. Punitive damages;
> 3. Interest;
> 4. Costs;
> 5. Attorneys' fees;

Attached to this complaint is a "Verification," signed by RAI President Angelini, stating, in part, "the facts set forth in the [district court] complaint are true and correct to the best of my information, knowledge and belief, and . . . this Verification is taken pursuant to 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities." In view of Raymond Angelini's signature on this "Verification" and the references in RAI's complaint to Local 98's action in drawing RAI's prevailing-wage violations to the attention of city officials (see particularly par. 67, which par. 148 of Count III incorporates by reference), I do not credit Angelini's testimony that such action by Local 98 was not a reason for RAI's lawsuit against Local 98.[9]

Local 98's June 5, 1996 answer to RAI's complaint denied the allegations in paragraph 37 that RAI's disqualification occurred at Local 98's "initiation and instigation," and denied that Local 98 "collaborated" with any defendant or any other city official to disqualify RAI, to preclude nonunion contractors from performing work at the airport, or to divest RAI of its bid in favor of Lombardo & Lipe. In addition, as to the allegations involving Wescott, Local 98 admitted that Wescott had been declared a nonresponsible bidder in consequence of information submitted by Local 98, but denied, or disavowed knowledge about, the other averments regarding Wescott. Local 98's answer denied the allegations in paragraphs 48–50; denied "as stated" paragraphs 51–52; admitted paragraphs 53 and 54; and, as to paragraph 55, stated:

> The averments of this paragraph are legal conclusions to which no responsive pleading is required. By way of further answer . . . Local 98 merely submitted information to the City regarding [RAI's] violation of New Jersey laws and engaged in no collaboration with any City officials.

In response to paragraph 116 of the complaint, which alleged, inter alia, "Upon information and belief" that several of the individual city defendants "were directly involved in encouraging, requesting, and/or ordering" the appeals panel to rule against RAI "in order to protect the Agreement which the City had made with Local 98 and to further its goal of 'union only' at the airport," Local 98's answer "specifically denie[d] that it made any 'agreement' with the City." In response to paragraph 117 of the complaint, Local 98 stated, among other things, that it had no agreement with the city to keep the airport union only. In response to paragraph 118 of the complaint, Local 98 stated, among other things, that it did not collaborate with the city in any manner, and that it did nothing other than to provide the city with information regarding RAI's violation of State laws. As to paragraph 124 of the complaint, Local 98's answer stated that these averments "are legal conclusions to which no responsive pleading is required." In addition, Local 98's answer alleged that the complaint failed to state a claim upon which relief could be granted, and that Local 98's complained-of actions were protected under Section 7 of the National Labor Relations Act.

4. RAI's April 1996 unsuccessful motion for injunctive relief; Local 98's May 1996 unsuccessful motion to dismiss the district court complaint

Also on April 23, RAI filed with the district court a "motion for temporary restraining order, preliminary injunction and/or permanent injunction" against all of the defendants named in the underlying lawsuit. This motion stated, inter alia:

> 15. Defendants' wrongful conduct and conspiracy to remove [RAI] from the Project . . . are more particularly described in [attorney Cohen's] affidavit.
>
> 16. As a consequence of the wrongful conspiracy to violate [RAI's] civil rights, [RAI] has lost unique and valuable property rights and/or liberty interests, including loss of its right to complete the electrical portion of the [Philadelphia Airport] project as successful bidder.
>
> . . . .
>
> 18. As a consequence, Lombardo & Lipe has been unjustly enriched and stands to substantially benefit as a consequence of the political considerations favoring contractors such as Lombardo & Lipe (signatory to a contract with Local 98) vs. [RAI] (an open shop contractor).

RAI also submitted a proposed "temporary restraining order" which included a provision enjoining the defendants, including Local 98, "from in any respect illegally or improperly interfering with [RAI] in the lawful completion of the electrical portions of the [Philadelphia Airport] Project." Also, the proposed order called for all defendants, including Local 98, to pay counsel fees and costs incurred by RAI "in bringing this action."

On May 14, 1996, Local 98 filed a motion to dismiss the complaint on the ground, inter alia, that it failed to state a claim on which relief may be granted. Local 98 asserted, inter alia, that RAI's complaint allegation of "a conspiracy between Local 98 and 'other Defendants' to violate [RAI's] rights . . . does not contain sufficiently specific allegations as to the conduct violating [RAI's] rights, the time or place of that conduct, or the identity of the conspiring parties. . . . Mere attempts to influence the enforcement or passage of legislation [are] not actionable under federal law [citing cases]. Similarly, union representations to State officials [do] not qualify as 'acting under color of state law' if such representations do not purport to be

[9] Angelini's testimony in this respect relied partly on RAI's similar conduct as to its competitors, and partly on RAI's failure to sue its competitors when they engaged in such conduct with respect to RAI. As to the latter assertion, it is at least as likely that RAI's failure to sue its competitors was due to its disliking them less than it disliked Local 98, as that such failure was due to tolerance of such reports regardless of source. I note the absence of evidence that prior to the Philadelphia Airport job, such reports from Local 98 or competitors had ever caused RAI to lose business. Angelini's testimonial reliance on RAI's failure to name Local 98 as a defendant in the State court suit to enjoin the city and Lombardo & Lipe from entering into a contract for the Philadelphia Airport job overlooks the fact that Local 98 would not have been a party to that contract.

done on behalf of the state. [RAI] avers that Local 98 simply provided the City with factually verifiable information concerning [RAI's] prior wage and hour violations and lobbied the City to preclude open shop electrical contractors from working at the Philadelphia International Airport and specifically, on the electrical project at issue . . . . Local 98's actions constitute traditional, and constitutionally protected, political activities."

By order dated May 22, 1996, the district court denied, without opinion, Local 98's motion to dismiss, and also such a motion by other defendants. By order dated May 26, 1996, and issued after a May 22–24 hearing, the district court denied, without opinion, RAI's request for an injunction. 984 F.Supp. at 875.

5. Local 98's November 7, 1996 unsuccessful Motion for Summary Judgment

Over date of November 7, 1996, Local 98 filed a Motion for Summary Judgment in its favor. Local 98's memorandum of law in support of this motion averred, in part (emphasis in original):

> [RAI] possessed no *evidence* that Local 98 did anything in this matter other than to advise the City of the results of its investigation into [RAI], and to request that the City conduct its own investigation and declare [RAI] to be a "non-responsible bidder." While Local 98's communication to the City may have been motivated by [RAI's] status as a non-union contractor, and by some desire to preclude such contractors from obtaining City work, such motivations and desires do not constitute state activity [within the meaning of 42 U.S.C. § 1983].
>
> . . . .
>
> [RAI] possesses no evidence that Local 98 had any involvement with the City's refusal to reconsider the panel's disqualification decision. It did not share the results of its findings [as to prevailing-wage violations by Lombardo & Lipe and other union contractors on the Philadelphia Airport job] with Local 98, nor does [RAI] possess any evidence that Local 98 was aware of its request for reconsideration or the submission of its findings to the City.
>
> [RAI's] other argument is equally absurd and baseless. [RAI] contends that the New Jersey prevailing wage violations were merely a pretext for the City's real reason for its disqualification on [the Philadelphia Airport job]—The City's satisfaction of a "political deal" with John Dougherty, the business manager of Local 98. [RAI] contends that its disqualification was the "*quid pro quo*" for Local 98 bringing a national electrical workers convention to the City during the summer of 1996.
>
> The only "evidence" [RAI] possesses regarding this "deal" stems from a conversation on March 15, 1996, between Plaintiff's then-counsel, Roy Cohen, Esquire, and Defendant Applebaum, the City's Procurement Commissioner. Cohen ran into Applebaum in an underground concourse on that date [see supra pt. II,C,2].
>
> Applebaum vigorously denied Cohen's allegations, both at the preliminary injunction hearing in this matter, and in his deposition. The credibility dispute between Cohen and Applebaum does not, however, create an issue of material fact with respect to Local 98. Even if Cohen is absolutely correct, Applebaum's statements do not constitute evidence or proof that Local 98 acted under color of state law, or was somehow involved in a conspiracy to deprive [RAI] of civil rights. Applebaum's alleged statements constitute nothing more than perceptions; more importantly, even if believed and said by Applebaum, the statements are totally incorrect.
>
> [RAI] will not, and cannot, offer any evidence that Local 98 or Dougherty were involved in the conduct of the International Brotherhood of Electrical Workers convention in Philadelphia in 1996. Ironically, [RAI] conducted no discovery into these allegations, and has not even attempted to obtain the convention contract from the City or the International union.
>
> Dougherty took office as Business Manager of Local 98 on July 13, 1993. . . . The agreement to hold the convention in Philadelphia in 1996 was reached between the City and the International union in October, 1992. . . . . Neither Dougherty nor Local 98 played any role in the agreement reached between the City and the International union regarding the 1996 convention. . . Moreover, that agreement did not contain any provisions that would permit the International union to cancel the convention because non-union contractors like [RAI] were performing work at the Airport.
>
> The only "pressure" Local 98 could bring to bear upon the City was to complain about the award of a City contract to a contractor with a verifiable history of prevailing wage violations. Local 98 did nothing more than that, and its complaints are well within its rights to petition government under the First Amendment.
>
> To the extent that the City, and the individual City Defendants, may have perceived that the City owed a political debt to Local 98 because of the 1996 convention, and may have acted upon those beliefs to wrongfully deprive [RAI] of civil rights, [RAI] may well be able to establish liability against these defendants. Such beliefs and actions, however, do not establish that Local 98 acted under color of state law here; nor do they prove in any way that Local 98 is liable to [RAI] for the actions of City officials.

RAI's November 25, 1996 memorandum of law in opposition to this Motion for Summary Judgment, and to such a motion filed by the city defendants, alleged, inter alia:

> the circumstantial evidence in this case strongly suggests that the City Defendants substituted Local 98's agenda for their own official authorization. It is readily apparent that Local 98's agenda was to preclude an open-shop contractor from the highly visible Airport Project at issue in this case (p. 3).
>
> [RAI], as an open-shop contractor, is monitored on an extremely close basis by governmental enforcement agencies, especially at the request of unions such as Local 98 (p. 5).
>
> [RAI's] complaint raises serious and disturbing issues concerning the perversion of the public bidding process to political expediency and the predatory, relentless and clearly actionable conduct of Local 98 (p. 6).

the evidence in this case fairly reeks of political favoritism towards Local 98 and State conduct that was driven by improper political and economic motivation (p. 7).

Dougherty admitted that "Local 98 takes an aggressive stance with respect to non-union contractors" (p. 12).

Local 98's "aggressive stance" with respect to open shop contractors [includes?] monitoring non-union contractors, investigating non-union contractors and regularly engaging in activities known as "salting" (p. 13).[10]

According to Dougherty, he . . . told [deputy mayor] Murphy that he had a problem with [RAI]; that . . . Dougherty. . . had attempted to organize [RAI] as a union contractor; that . . . Dougherty . . . was concerned because [RAI] was coming into Pennsylvania (p. 13).

Dougherty admitted that he became angry as a consequence of [deputy mayor] Murphy's initial response to Local 98's complaints concerning [RAI] and that as a consequence, Dougherty began to call and write to City Council members (p. 13). [Cf. fn. 11, infra.]

Dougherty further admitted that Local 98 has made monetary contributions to Mayor Rendell's campaign and that he (Dougherty) has been a political supporter of Defendant Rendell (p. 14) [Cf. fn. 11, infra.]

Dougherty wrote a letter dated January 17, 1996, to Councilman Kenney, [who, Dougherty testified] has always been a supporter of union labor. (p. 14). [Cf. infra fn. 11.]

Dougherty also contacted Councilman Mariano concerning [RAI's] successful bid. (p. 14)[11]

[T]he conduct at bar was completely pretextual and part of a pre-arranged scenario arrived at by Defendants for political reasons (p. 25).

According to [Attorney Roy] Cohen's affidavit and his testimony . . . Applebaum . . . admitted that the decision to disqualify [RAI] had been made as a result of [Mayor] Rendell's and [City chief of staff David] Cohen's political obligations to Local 98 (p. 26).

[T]here is considerable evidence in this case that the [Disqualification Hearing] panel reached a result which was irrational, based upon political considerations, and prearranged as per the directives of the Mayor and his Chief-of-Staff (p. 32).

Within the context of Local 98's admittedly "aggressive stance" against open shop contractors . . . Local 98's assertion of a public interest concern [that RAI was allegedly not a responsible bidder] is more than a bit suspect. When the Court considers that Local 98 supports union contractors such as Lombardo and Lipe who have more serious wage violations than [RAI], it becomes clear that Local 98's activities were predatory in nature (pp. 40–41).

The point is that Dougherty exerted political influence on the City and the City bent to that influence. When the Defendants collaborated in that fashion, they clearly violated [RAI's] civil rights (p. 42).

On March 6, 1997, the district court denied, without opinion, this Motion by Local 98 for Summary Judgment.

6. Documents produced during discovery procedures

a. The January 1996 memorandum from Murphy to Chief of Staff David Cohen

One of the documents produced during the discovery procedures conducted pursuant to RAI's complaint was a memorandum to Chief of Staff David Cohen from Deputy Mayor for Labor Murphy, dated January 12, 1996. The memorandum began as follows:

> Re: Telephone Message from John Dougherty
>
> I returned the phone call to John Dougherty who was calling you regarding the B-C Terminal Electrical package which is a $7M package. The facts are as follows:
>
> Fact:
>
> 1. The low bidder was [RAI, which] is a large non-union contractor from New Jersey.
> 2. [RAI's] bid is low by [$600,000]. The next bidder is Lombardo & Lipe, who is a union electrical contractor.
> 3. The low bid fell within one or two percent of the estimate prepared by the Airport's estimator which has been right on the money in their estimates for the entire B-C package.
> 4. All of the other [contracts] for B-C Terminal have been awarded to union contractors.

Then, under the heading "IBEW 98: Concerns," after spelling out certain "arguments" which Local 98 had at least allegedly advanced against awarding the airport contract to RAI, Murphy, in effect, rejected or found lack of evidence as to each of them. The memorandum went on to say:

> *Ramification:*
>
> 1. John Dougherty has indicated that he will definitely picket the job because it would cause him embarrassment for a non-union contractor to have this large a job at the Airport during a year when his International Convention is in Philadelphia. In addition, he is running for reelection this summer.
> 2. All the other contracts at B-C Terminal are union and if there are pickets, we can expect that the other trades will honor the pickets for a least a couple of days until they are ordered back to work by the Project Manager (Keating Co.).
> 3. I'm sure John will contact some Council members to argue on his behalf.
>
> [RAI] has had some city projects which I am currently researching. As of this date, I have not found any violations on any jobs performed by [RAI].

Among the "arguments" which as of January 12 Murphy had found unsupported was, "They supposedly have information that [RAI] has had violations in New Jersey and that if [it] has one more violation, [it] will be debarred (Local 98 has not submitted any documentation to substantiate this)." As previ-

[10] See *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995).

[11] See 984 F.Supp. at 877, par. 36, 883, par. 17. I can find no other probative evidence in the instant record concerning the matters set forth in the last four quoted paragraphs.

ously noted, "documentation" of RAI's New Jersey violations was submitted to Murphy in late January 1996.

The district court summarized this January 12 memorandum as follows (984 F.Supp. at 876, par. 21): "Mr. Murphy outlined the facts, listing the various concerns which Local 98 had about [RAI's] bid and its bidder status." Angelini testified to the opinion that this memorandum by Murphy corroborated everything attorney Roy Cohen had said in his affidavit (see supra pt. II,C,2). Angelini further testified that he saw no problem with Local 98's picketing in general; that he had been picketed; that if Local 98 pickets, the other trades working on the job are likely to honor the picket line and shut the job down for a couple of days; that he saw no problem with another trade's or an individual union member's honoring the picket line; and that Angelini saw no problem with anybody's lobbying elected officials.

b. The purported October 1994 memorandum from Toland to MJK Electric

Also produced during the discovery procedures was what at least purports to be a handwritten memorandum, dated October 11, 1994, from Wendell Toland Jr. (an employee of the Minority Business Enterprise Council, an agency of the City of Philadelphia) to a representative of an electrical contractor, MJK Electric Company, regarding at least facial defects as to undertakings for minority hiring in a solicitation form submitted by Wescott Electric Co. in connection with a proposed subcontract with MJK for an airport fire alarm system. This memorandum stated that two other employees of the Minority Business Enterprise Council had told Toland that "Wescott is 'out,' based on what they submitted. Due to the fact that Wescott and E.J. Electric [not otherwise identified in the record] are non-union *and* the fact that this is an election year, Local 98 stands a good chance of getting this project to be *Rebid*. They (Local 98) really have to lobby hard" (emphasis in original). Angelini testified, "This is one of the documents. . . that persuaded me to believe that there was a political dealing going on here."

7. RAI's proposed findings of fact and conclusions of law, and RAI's memorandum of law, filed with the district court in July 1997

The district court conducted a bench trial on April 16–18, 21, and 28, 1997. Testimony from the injunction hearing (conducted on May 22–24, 1996) was considered as part of the trial testimony (984 F.Supp. at 875).

On July 7, 1997, RAI filed with the district court a document captioned "[RAI's] Proposed Findings of Fact and Conclusions of Law." This document averred, inter alia, that RAI "asserts that it was denied [the Philadelphia Airport contract] as a result of [RAI's] open shop (i.e., nonunion) status and the political influence of defendant Local 98." This document further included the following assertions: "Local 98 takes an aggressive stance with respect to non-union contractors" (p. 6). Dougherty had been a "political supporter" of Mayor Rendell, had made "political, monetary contributions" to him, and had attended "political dinners" for him (pp. 7–8). Local 98 had contributed money to Mayor Rendell's campaign (p. 8). Local 98 had been supportive of the local Democratic Party, including the provision of members' services at the election polls (pp. 8, 12). One or more of the city defendants had improperly disclosed RAI's confidential financial information (submitted in connection with RAI's bid for the Philadelphia Airport job) to Local 98 (pp. 14–15). Dougherty had called and written to city council members about deputy mayor Murphy's initial refusal to comply with Dougherty's request to disqualify RAI from the Philadelphia Airport project (pp. 20, 23–24). RAI's disqualification "occurred as a result of a conspiracy between defendants to deny [RAI's Philadelphia Airport bid] based upon its open-shop status" (p. 51). Toland's at least purported October 1994 memorandum to MJK about Wescott (supra pt. II,C,6,b) is "persuasive and convincing evidence that the City's procurement process is subject to political influence by Local 98 and that the City and Local 98, acting in concert, have pursued a policy of improperly and unlawfully restricting the work performed by open-shop contractors at the Airport" (p. 67). "Dougherty's predatory attitude and actions with respect to work at the Airport can be measured by the erosion of open-shop contractors working at the Airport" (p. 71). In October 1996, an individual who identified himself to an RAI employee as a Local 98 member told that employee that "we took that job away from you on the airport," and that "as a result of Dougherty's political connections, members of Local 98 were receiving more work than they had in six years and that Dougherty's political power has resulted in [RAI's] disqualification from the Project" (p. 71) "Defendants' arrogance" is reflected by "contradictory testimony by the City's officials and Local 98" (p. 72). If RAI had been awarded the Philadelphia Airport job, RAI's "direct return" would have amounted to about $1,150,000 (p. 73). "Defendants' actions were not rationally related to any legitimate governmental interest but, instead, were motivated by political and/or economical [sic] motives" (p. 77). Local 98 "acted in concert with a public agency and its officials . . . to deprive [RAI] of its constitutional rights" (p. 77). RAI's "disqualification . . . and classification as non-responsible resulted from political influence and/or the agreement between the City and Local 98 and constituted arbitrary and irrational government action" (p. 77). "Defendants acted with malice or indifference to [RAI's] constitutionally protected rights when they perpetrated their scheme to deprive" RAI of the Philadelphia Airport job (pp. 77–78).

RAI's 34-page memorandum of law to the district court in support of these "Proposed Findings" included the following statements:

> Not only did Local 98 fail to deny its predatory, ferociously aggressive view of open shop contractors such as [RAI], inexplicably, Local 98 and its attorneys bragged of Local 98's "aggressive stand" and frequent attacks upon open shop contractors (p. 5). [Local 98 witnesses' explanations as to why the City reversed the disqualification] are a study in cynicism, half-truths and deceit (p. 12). Dougherty circulated . . . a vitriolic screed against [RAI] (p. 14). [RAI] lost [the Philadelphia Airport job], one of the most prestigious jobs in the Company's history, because of the political considerations referenced above and Local 98's raw political power (p. 17) . . . defendants collaborated and conspiratorially predetermined that [RAI]

> would be disqualified as "non-responsible" (p. 21). . . . A fair inference from the preponderance of the evidence presented is that Local 98 exerted influence to pervert the law through an agreement between the City and Local 98 that [RAI] would not get this job at any price and/or regardless of the circumstances (p. 26). Dougherty's incredible and arrogant testimony that he was able to comment upon [RAI's] financial statement as a result of a "calculated guess" reveals defendants' willingness to effectively flaunt their conspiracy before this Court (p. 26). Dougherty forwarded Local 98's report (an unjust and inaccurate indictment) against [RAI] to [the mayor's chief of staff and office]. Thus, Local 98's conduct was far more pernicious . . . than a proper exercise of First Amendment rights in connection with lobbying for legislation (p. 27). . . . In determining the amount of punitive damages to be assessed against Local 98 and the individual City Defendants, the Court should consider . . . the amount of time each defendant engaged in the outrageous conduct [and] the potential profits each defendant may have made from its outrageous conduct (p. 32).

8. The district court's November 1997 dismissal of RAI's complaint

On November 24, 1997, the district court issued a memorandum dismissing RAI's complaint in its entirety, with prejudice. *Ray Angelini, Inc. v. City of Philadelphia,* 984 F.Supp. 873 (E.D.Pa. 1997). This judgment was never appealed; Angelini testified that RAI did not appeal because of the expense involved. RAI conceded at the outset of the hearing before me that RAI was bound by the district court's factual findings to the extent that they were necessary to the district court's determination.

The district's court's memorandum included the following findings: Prior to the February 1996 hearing on RAI's appeal of the disqualification determination with respect to the Philadelphia Airport project, defendants Egan and Coleman, both whom sat on the panel, were not aware of any city policy to disfavor nonunion contractors in public works contracts (984 F.Supp. at 878, pars. 62, 68). Nobody indicated to Egan, either directly or in any fashion, how she was to cast her vote (984 F.Supp. at 878, par. 60). Nobody in City government indicated by suggestion or directly how Coleman should vote (984 F.Supp. at 878, par. 69). Prior to the disqualification hearing, Egan did not know whether RAI was union or nonunion (984 F.Supp. at 878, par. 51). RAI's nonunion status did not play any role in the casting of Coleman's vote, and did not play any role either at the hearing or during the deliberations (984 F.Supp. at 879, par. 71). In casting his vote, Applebaum (the third member of the panel) was not influenced in any way by the wishes or directives of Local 98 (984 F.Supp. at 879, par. 77). Egan, Coleman, and Applebaum, in that order, voted unanimously to uphold RAI's disqualification (984 F.Supp. at 878, pars. 58, 59). Egan so voted because of RAI's New Jersey prevailing-wage violations, which in her mind were not disproven at the hearing (984 F.Supp. at 878, par. 63). Coleman so voted because he did not think that a case was presented such that disqualification should be overruled (984 F.Supp. at 878–879, par. 70). Egan was not promised any benefits or anything of value in exchange for her vote, and her promotion after the hearing was not the result of any vote she cast there (984 F.Supp. at 878, pars. 64–65). The Philadelphia Airport job was not subject to a project labor agreement (984 F.Supp. at 881, par. 124). The City had no official or unofficial prounion policy with respect to the procurement and award of public contracts, and has no policy of trying to disqualify nonunion bidders simply because they are nonunion (984 F.Supp. at 881-882, par. 125). There was no agreement between Mayor Rendell and Local 98 with respect to the award of competitively bid contracts (984 F.Supp. at 882, par. 126). The letter agreement with respect to the September 1996 IBEW convention at the Pennsylvania Convention Center had been entered into by the Convention Center's representative and the IBEW in 1992, and the convention was not a quid pro quo for any city action on behalf of Local 98 with respect to RAI (984 F.Supp. at 882, pars. 130–131). Whether Local 98 would have been embarrassed during that convention because a nonunion contractor was performing work at the airport was not something that Mayor Rendell or the city was concerned about and was not something that would have influenced the city's actions (984 F.Supp. at 882, par. 132). Local 98 never obtained a copy of RAI's financial statements (984 F.Supp. at 877, par. 46).

Both Applebaum and Attorney Roy Cohen testified before the district court. As to their March 15, 1996 conversation, the subject of Roy Cohen's affidavit (see supra pt. II,C,2), the district court found as follows (984 F.Supp. at 879–880, citations to the district court record omitted):

> 90. During their encounter, Commissioner Applebaum and attorney Cohen had a discussion relating to a press conference that Angelini had threatened to hold with respect to its disqualification.
>
> 91. During the discussion, Commissioner Applebaum expressed to attorney Cohen that he was unhappy with the decision to disqualify Angelini and probably said that it was a shame that the City had to expend an additional $600,000.
>
> 92. During the discussion, Commissioner Applebaum suggested to attorney Cohen that attorney Cohen could talk to the City's lawyers and that there could hopefully be an arrangement to remove the disqualification through an expungement, because in Commissioner Applebaum's view there was never any intention to hurt [RAI] (or any other vendor that does business with the City).
>
> 93. The discussion regarding expungement was not intended to result in making [RAI] the qualified bidder and being awarded the contract.
>
> 94. Commissioner Applebaum did not tell attorney Cohen that Mayor Rendell and Chief of Staff Cohen had collaborated with Local 98.
>
> 95. Commissioner Applebaum has no knowledge of whether Local 98 ever helped Mayor Rendell politically in any respect.
>
> 96. Chief of Staff Cohen never had a conversation with Commissioner Applebaum in which he expressed a

view as to how he would feel if [RAI] were to hold a press conference.

The district court's conclusions of law included the following: RAI had failed to show that the city's procurement department had a prounion or antiopen-shop contractor policy when it initially disqualified RAI on the Philadelphia airport job (984 F.Supp. at 882, par. 5). RAI had failed to prove that this department's decision to disqualify RAI on that job was the result of improper political influence or agreement between the city and Local 98 (984 F.Supp. at 882, par. 6). "The evidence in this matter indicates that Local 98 submitted information to various city officials about [RAI]. The city conducted its own investigation into Local 98's allegations and rejected all but the alleged violations of the prevailing wage laws. Local 98 did not act with any State appeals to deprive [RAI] of a constitutionally protected right" (984 F.Supp. at 883, par. 17).

The district court's order required RAI to pay the costs of the proceeding, but denied Local 98's request for counsel fees. 984 F.Supp. at 885.

9. The May 1996 charge, and the February 1998 complaint, in the instant proceeding

Meanwhile, on May 7, 1996, about 2 weeks after RAI had initiated its lawsuit in the district court, Local 98 filed its charge herein, alleging, inter alia, that RAI "initiated [the district court lawsuit] in retaliation for Local 98's provision of information to the city, and for Local 98's success in having [RAI] removed from a project." The charge requested relief under Section 10(j) of the Act. By letter dated June 28, 1996, the Regional Director advised RAI's and Local 98's counsel, "It was concluded that further proceedings should be held in abeyance pending the disposition of the lawsuit." The complaint before me issued on February 20, 1998, about 3 months after the district court dismissed RAI's complaint before it.

D. Analysis and Conclusions

The General Counsel's claim rests on *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731 (1983), where the Supreme Court held that an employer violates Section 8(a)(1) of the Act by filing and processing an unsuccessful lawsuit in retaliation for the exercise of rights protected by Section 7. Although involving an employer's lawsuit against individual employees, *Bill Johnson's* has been held applicable to lawsuits against unions with respect to lawful conduct which may tend to further the exercise of Section 7 rights by statutory employees. *BE& K Construction Co.,* 329 NLRB 717 (1999); *Petrochem Insulation, Inc.,* 330 NLRB 47 (1999); and cases cited. The principal issue in this case is whether RAI's lawsuit against Local 98 was retaliatory within the meaning of *Bill Johnson's*.

As stated in *Petrochem Insulation*, supra, a lawsuit aimed directly at protected activity necessarily tends to discourage similar protected activity and is, by definition, retaliatory within the meaning of *Bill Johnson's.* RAI concedes (Br. 5) that at least standing alone, Local 98's conduct in reporting to city officials RAI's violation of New Jersey prevailing wage laws in the performance of public works projects in New Jersey constituted activity protected by Section 7 of the Act.[12] Furthermore, at least standing alone, Union Business Agent Dougherty's at least alleged efforts to lobby State government officials, in order to induce them to award (or to persuade other government officials to award) public works projects to union shop rather than to open shop contractors, were likewise protected by Section 7. See *BE & K*, supra, and cases cited; *Petrochem*, supra, and cases cited; *Bristol Farms*, 311 NLRB 437 (1993). Such precedents show that standing alone, RAI's contention (Br. pp. 6, 13) that Section 7 did not protect efforts by Local 98 "to have [city] council members politically influence the bidding/investigation process" and to use "political influence to have [RAI] knocked off the Airport Project" has no merit.[13] As noted supra, part II,C,3, RAI's district court complaint as to Local 98 specifically described Local 98's action in calling to city officials' attention RAI's violations of New Jersey prevailing wage laws (see pars. 67, 148). In addition, as previously noted, RAI's district court complaint alleged (pars. 48–50) that Local 98 Business Agent Dougherty had "advised the city of his desire to preclude open shop electrical contractors from working" at the Airport project; that the city and the defendant city officials "agreed to assist" Local 98 in that endeavor; that the city had "entered into an understanding with Local 98 . . . whereby the City assured Local 98 that [the City] will attempt to preclude open shop contractors from working at the Airport;" and that "This understanding was a quid pro quo for the electrical workers bringing a national electrical workers' convention to the City . . . in the summer of 1996."[14] That RAI's recita-

[12] *Eastex, Inc. v. NLRB,* 437 U.S. 556, 564–570 (1978); *BE & K,* supra. RAI's brief to me (p. 5) states that in an attempt to have RAI deemed a nonqualified bidder, Local 98 prepared and distributed to the city a report criticizing RAI (see 984 F.Supp. at 876, par. 22). RAI's brief to me also alleges, citing only its proposed findings of fact in the district court proceeding, that Union Business Agent Dougherty told Deputy Mayor Murphy (1) that RAI's "financial statement" was questionable, (2) that RAI had obtained a mortgage for a sum allegedly in excess of the worth of the mortgaged building, and (3) that RAI had a problem with minority participation on a project in New Jersey. As to the assertions in the last sentence, the only relevant probative evidence I can find in the record before me is pp. 64–68 of Dougherty's deposition in the district court proceeding (several pages of which were received in evidence as part of R. Exh. 6), which does not wholly support these assertions in RAI's brief. In any event, RAI's brief to me (p. 5) concedes that all of Local 98's at least alleged conduct described in this footnote is lawful activity protected under Sec. 7.

[13] However, RAI's July 1997 "Memorandum of Law in Support of Proposed Findings of Fact and Conclusions of Law" states at p. 28, "no part of this case relates to 'lobbying efforts.'" Further, Angelini testified that he saw no illegality or problem with lobbying, and saw no problem with a person's having political connections.

[14] Local 98's answer to the district court complaint alleged (par. 49), and the district court found (984 F.Supp. at 882, par. 130), that Local 98's parent International and the city had entered into an agreement in 1992 regarding the September 1996 convention in Philadelphia. Angelini testified, in effect, that such contracts are sometimes canceled. Local 98's complained-of activities began about 9 months before the convention was scheduled to begin, and Attorney Cohen's affidavit accompanying RAI's district court complaint states that according to commissioner Applebaum, 5000 people were expected to attend the convention. However, Angelini testified in February 2000 that a con-

tions in its district court complaint implicated Section 7 is further indicated by the statement of RAI's counsel, at the outset of the hearing, that the foregoing conduct by Local 98 was motivated by Dougherty's desire to be reelected as business agent; although there is little specific record evidence of such motives by Dougherty, the existence of such motives by an elected union official not only is a natural inference, but also is one of the very reasons why Federal law and/or the Union's internal rules make its officials' job security subject to periodic elections. Because an employee exercises Section 7 rights when he runs for, or votes or campaigns in an election for, union office, or attempts to induce customers or government officials to use union (rather than nonunion) firms,[15] a derivative Section 7 right is exercised by a union official's efforts to ingratiate himself with potential voters in his reelection campaign by (as here) thus seeking to obtain jobs for union firms (and, therefore, necessarily to limit the job opportunities of employees who work for nonunion firms). Further, RAI's November 1996 opposition to Local 98's Motion to the district court for Summary Judgment relied on, among other things, "circumstantial evidence" that Union Business Agent Dougherty attempted to bring about RAI's disqualification by, inter alia, calling and writing members of the Philadelphia City Council—alleged conduct which would be presumptively protected by Section 7 (cf. supra, fn. 13). Indeed, even RAI's proposed findings of fact and conclusions of law to the district court (GC Exh. 4, p. 77, par. 5) merely state that RAI's disqualification and classification as a non-responsible bidder "resulted from political influence *and/or* the agreement between the City and Local 98" (emphasis added).

Moreover, the district court complaint on its face not only indicates that the complaint was directed against Local 98's admittedly protected conduct in reporting prevailing-wage violations to public authorities, but also indicates specific resentment against such protected reports. Thus, the complaint describes as "willful, wanton and malicious conduct" Local 98's submission of information to appropriate agencies with respect to both the Philidelphia Airport job and in unsuccessful efforts to disqualify RAI with respect to a 1995 public works project and another nonunion contractor (Wescott) with respect to a 1995 fire alarm system job (see pars. 38–46, 148, 155).[16] Also, with less specificity, the complaint alleges that "Local 98 acted with reckless and callous disregard and indifference to [RAI's] rights and liberty interest." A retaliatory motive is further evinced by RAI's request for punitive damages (in addition to actual damages, as to which the district court found little supporting evidence; see 984 F.Supp. at 881, especially par. 118); see *H. W. Barss Co.,* 296 NLRB 1286, 1287–1288 (1989); *Petrochem,* supra. Also, RAI counsel's November 25, 1996, memorandum of law in opposition to Local 98's November 7, 1996 Motion for Summary Judgment (supra pt. II,C,5), and RAI counsel's posttrial memorandum and proposed findings of fact and conclusions of law (supra pt. II,C,7) filed with the district court, are rather more uncomplimentary of Local 98's motives and conduct than would ordinarily be expected in a lawsuit free of retaliatory intent.[17]

Notwithstanding the foregoing Section 7 status of Local 98 activities thus described and characterized in RAI's district court complaint, RAI contends before me that this complaint was not directly aimed at protected activity but, instead, was initiated on the basis of the contention that a "conspiracy" existed between Local 98 and the city defendants. The difficulty with this contention is that the Section 7 conduct described above (including Local 98's at least alleged use of "political influence") is the only conduct which RAI's complaint even suggests was engaged in *by Local 98* in furtherance of this alleged "conspiracy." The conclusion that RAI's complaint against Local 98 was really limited to such union conduct is further pointed to by other statements in RAI's November 1996 "Memorandum of Law Contra Defendants' Motions for Summary Judgment". Thus, this "Memorandum" states:

> [T]he circumstantial evidence in this case strongly suggests that the City Defendants substituted Local 98's agenda for their own official authorization. It is readily apparent that Local 98's agenda was to preclude an open-shop contractor from the highly visible Airport Project at issue in this case (p. 3).
>
> [T]here is considerable evidence that the panel [which rejected RAI's disqualification appeal] reached a result which was irrational, based upon political considerations, and prearranged as per the directives of the Mayor and his Chief-of-Staff (p. 32).
>
> [T]he point is that Dougherty exerted political influence on the City and the City bent to that influence (p. 42).

No more than this is suggested by the statements attributed to Commissioner Applebaum by Attorney Roy Cohen's affidavit, which according to president Angelini's testimony accurately

vention "involving tens of thousands of people" which was scheduled for the early summer of 2000 had been arranged for in late 1999.

[15] See *Barton Brands*, 298 NLRB 976, 980 (1990); *Circle Bindery, Inc.,* 218 NLRB 861 (1975), enfd. 536 F.2d 447 (1st Cir. 1976); *Bristol Farms*, supra, 311 NLRB 437.

[16] I do not credit Angelini's testimony that this allegation was included in the complaint because of reports from his son and others, apparently after the disqualification hearing as to the SEPTA job for which RAI successfully bid in 1995, that the younger Angelini "was taunted by Local 98 Business Agent [presumably Dougherty]; invited to fight, and they even shoved him." The district court complaint does not refer to this alleged incident, and Paragraph 155 of the complaint refers to Local 98's conduct "previously directed against [RAI] and others."

[17] "Local 98's activities were predatory in nature." "Dougherty's predatory attitude and actions." "Defendants' arrogance." "Defendants acted with malice or indifference to [RAI's] constitutionally protected rights when they perpetrated their scheme." "Not only did Local 98 fail to deny its predatory, ferociously aggressive view of open shop contractors such as [RAI], inexplicably, Local 98 . . . bragged of Local 98's 'aggressive stand' and frequent attacks upon open shop contractors." Local 98's witnesses' testimony is "a study in cynicism, half-truths, and deceit." Dougherty circulated "a vitriolic screed " against RAI. "Dougherty's incredible and arrogant testimony." "Dougherty forwarded Local 98's report (an unjust and inaccurate indictment) against [RAI] to [city officials]. Thus Local 98's conduct was far more pernicious . . . than a proper exercise of First amendment rights in lobbying for legislation." "[E]ach defendant engaged in outrageous conduct." Local 98's "predatory, relentless, and clearly actionable conduct."

reflects the statements to him by Cohen which allegedly led Angelini to conclude that Local 98 was a party to an actionable "conspiracy" against RAI. Cohen's affidavit merely attributes to Applebaum the statements that the city defendants had decided to award the Philadelphia Airport contract to Lombardo & Lipe "as a result of [their] political obligations to Dougherty;" that "it would not look good" if a non-union contractor was working on the Philadelphia Airport project when the union convention came to town; and that "it was only when Gerald Murphy, Deputy Mayor For Labor, receives a lot of pressure from a particular labor union that he uses his power to declare a contractor non-responsible to obtain the desired result." Indeed, RAI's November 1996 "Memorandum of Law Contra Defendants' Motions for Summary Judgment" states (p. 45) that Attorney Roy Cohen's "knowledge" that Local 98 "collaborated with the City to pervert the public bidding process" was based merely on "the existence of the union's influence in the collaboration" as "admitted" by alleged City collaborator Applebaum. Accordingly, I do not credit Angelini's testimony that Attorney Cohen's March 15, 1996 description to Angelini of Applebaum's remarks led Angelini to conclude that RAI had been kicked off the job because of a "conspiracy" between Local 98 and city officials.

Nor do I credit Angelini's testimony that in maintaining RAI's lawsuit against Local 98 with respect to the Philadelphia Airport job for which the city had solicited bids in late 1995, he was partly motivated by his inspection of a handwritten document (obtained during discovery procedures) purporting to be an October 1994 memorandum from an employee (Wendell Toland Jr.) of the City's Minority Business Enterprise Council to an electrical contractor (MJK) in connection with subcontractor Wescott (supra sec. II,C,6,b). The thrust of this memorandum was that Wescott was unlikely to obtain a contract for an airport fire alarm system, for which Wescott was apparently the low bidder, because of at least facial defects as to undertakings for minority hiring in a solicitation form submitted by Wescott. As to the effect of Wescott's nonunion status, Toland's purported memorandum merely stated that because Wescott and another firm (whose role is not shown by the record) were nonunion and "this is an election year,"[18] Local 98 stood a "good chance of getting this project to be rebid" but Local 98 would "really have to lobby hard" (supra pt. II,C,6,b). As the General Counsel's brief points out (pp. 13–14, fn. 8), "If the City and the Union were part of a conspiracy/arrangement/quid pro quo, then why would the Union have to 'lobby hard'?"[19] Neither do I credit Angelini's testimony that RAI maintained the lawsuit against Local 98 partly because of the January 1996 memorandum (obtained during discovery procedures) from Deputy Mayor Murphy to City Chief of Staff David Cohen.[20] This memorandum indicates that as of the date it was written (January 12, 1996), Murphy saw no reason to deny RAI the Philadelphia Airport job (supra sec. II,C,6,a).

In short, I do not accept Angelini's testimony that RAI's claim of an actionable role by Local 98 in the "conspiracy" did not consist of (or even include), Local 98's Section 7-protected conduct. Rather, I find that the conduct which RAI claimed as Local 98's part in the alleged "conspiracy" with the city defendants consisted of Local 98's protected action in providing the City with information regarding RAI's New Jersey wage-standards violations and in lobbying various city officials in an effort to obtain city contracts for union contractors. Neither do I accept RAI's contention, based mostly on Angelini's testimony, that RAI initiated and/or maintained its lawsuit against Local 98 partly in order to protect the right of RAI's employees to work without union representation. In so arguing, RAI relies mostly on the fact that a majority of its electrical employees voted "for the Employer" in an election where a local union other than Local 98 was on the ballot, and which took place more than 7 years before the events here at issue. Cf. *Operating Engineers Local 3* (*Specialty Crushing)*, 331 NLRB 369 fn. 10 (2000).[21]

For the foregoing reasons, I conclude that RAI filed, maintained, and prosecuted its unsuccessful district court lawsuit against Local 98 in retaliation for the exercise of rights guaranteed by Section 7 of the Act, and thereby violated Section 8(a)(1).

CONCLUSIONS OF LAW

1. RAI is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Local 98 is a labor organization within the meaning of Section 2(5) of the Act.
3. RAI has violated Section 8(a)(1) of the Act by filing, maintaining, and prosecuting a lawsuit against Local 98 in retaliation for the exercise of rights guaranteed by Section 7 of the Act.
4. The unfair labor practice described in Conclusion of Law 3 affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that RAI has engaged in certain unfair labor practices, I shall recommend that RAI be required to cease and desist from such conduct, and like or related conduct.

Affirmatively, RAI will be required to reimburse Local 98 for all legal and other expenses incurred in defending against

[18] It is unclear what "election" this October 1994 document was referring to. Union Business aAgent Dougherty at least allegedly sought reelection in the summer of 1996 (see R. Exh. 2, p. 2). The record fails to show the date for which the earliest municipal election was scheduled.

[19] This fire-alarm job was never awarded as such and was eventually folded into the Philadelphia Airport job. Angelini testified that when bidding for the Philadelphia Airport job, he intended to use Wescott as a subcontractor on that job. See also fn. 20, infra.

[20] This January 1996 memorandum from Murphy suggests that the City's failure to award the fire alarm system to Wescott, the low bidder, was due to its having had "a number of Federal violations." The memorandum further suggests that when bidding for the Philadelphia Airport job, RAI was not required to specify its intended subcontractors, including Wescott.

[21] However, because RAI's employees were not parties to the district court proceeding, I find no merit to the General Counsel's reliance (Br. p. 9) on RAI's failure to include in its complaint a request that damages be paid to them.

RAI's lawsuit, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); and *Teamsters Local 776 (Rite Aid Corp.),* 305 NLRB 832, 835–836 and fn. 10 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 954 (1993). *Petrochem Insulation,* supra, 330 NLRB 47; *BE & K Construction*, supra, 329 NLRB 717. Although RAI's brief (p. 25) asserts that RAI's case "was not deemed so unreasonable by the judge that heard the entire case that [attorneys'] fees were warranted," this ruling by the district court judge (who gave no reason for his denial, 984 F.Supp. at 885, par. 3) does not render inappropriate a Board remedial order for reimbursement of such fees. As the Board said in *BE & K,* supra at 728 (emphasis in original, footnote omitted):

> We do not award attorneys' fees in *Bill Johnson*'*s* cases because employers' suits are *frivolous*. We award them because the suits are *unlawful*; they themselves constitute the unfair labor practices for which a remedy must be provided. As the court of appeals correctly observed in [*Geske and Sons, Inc. v. NLRB,* 103 F.3d 1366, 1379 (7th Cir. 1997)], the Unions would not have incurred those attorneys' fees except for [the employer's] meritless lawsuit, and it is both appropriate and necessary that they be made whole and to provide an economic disincentive for engaging in similar unlawful conduct.

Of course, RAI will not be required to pay Local 98's litigation expenses to the extent that RAI has already paid them pursuant to the district court's order.

With the consent of all parties, I received into the record certain evidence showing the amounts, which would be due Local 98 from such an order. This evidence shows as follows: Local 98's legal expenses in defending the lawsuit (i.e., fees and disbursements) totaled $72,689.28. The district court required RAI to pay Local 98 certain costs in the amount of $9168.04, and RAI paid that amount directly to Local 98. The parties stipulated that the legal fees charged by Local 98's law firm for representing Local 98 were reasonable. Of the Union's expenses, a total of $63,521.24 remains unreimbursed. Accordingly, RAI will be required to pay Local 98 a total of $63,521.24, plus interest.

In addition, RAI will be required to post appropriate notices at its facility in Sewell, New Jersey, the location requested by the General Counsel by letter to me dated May 2, 2000.

On the these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

The Respondent, Ray Angelini, Inc., Sewell, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Filing, maintaining, or prosecuting lawsuits with causes of action against International Brotherhood of Electrical Workers, Local Union No. 98, that are without legal merit and that are motivated to retaliate against activity protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reimburse Local 98 for its legal and other expenses incurred in the defense of the lawsuit filed by Ray Angelini, Inc., in the amount of $63,521.24, plus interest in the manner set forth in the remedy section of this decision.

(b) Within 14 days after service by the Region, post at its facility in Sewell, New Jersey, copies of the attached notice marked "Appendix."[23] Copies of this notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its Sewell, New Jersey, facility, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 23, 1996.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT file, maintain, or prosecute lawsuits with causes of action against International Brotherhood of Electrical Workers, Local Union No. 98, that are without legal merit and are motivated to retaliate against activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board."

WE WILL reimburse Local 98 for the legal and other expenses, plus interest, which Local 98 incurred in the defense of our lawsuit, to the extent that we have not already done so pursuant to the order of the court before which we brought the lawsuit. Exclusive of interest, the net amount which we will thus pay is $63,521.24.

RAY ANGELINI, INC.